No. 12,128

IN THE

United States Court of Appeals

For the Ninth Circuit

ALBERT ADELMAN,
Appellant,

vs.

UNITED STATES OF AMERICA,
Appellee.

BRIEF FOR APPELLANT.

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JURISDICTIONAL STATEMENT.

This is an appeal from an order of the District Court of the United States for the Northern District of California, Southern Division (hereinafter referred to as the "Court below"), denying appellant's motion to correct the judgment and sentence (T. 13). The Court below had jurisdiction of the motion to correct its judgment and sentence under the provisions of Section 2255 of Title 28, United States Code (Judicial Code and Judiciary). Jurisdiction to review the order of the Court below denying the motion to set aside and correct the sentence is conferred upon this Court by said Title 28, United States Code, Section 2255.

OPINION BELOW.

The opinion of the Court below is incorporated in its order denying motion to correct judgment and sentence and appears in the transcript of record at pages 13 and 14.

STATEMENT OF THE CASE.

In the March, 1946 term of the Southern Division of the United States District Court for the Northern District of California, the Grand Jurors presented an indictment in four counts against appellant (hereinafter referred to as "defendant") (T. 3 and 4). The first count of the indictment charged a violation of the Harrison Narcotic Act, 26 USC 2553 and 2557. The second count of the indictment charged a violation of the Jones-Miller Act, 21 USC 174. The third count of the indictment charged a violation of the Harrison Narcotic Act, 26 USC 2553 and 2557. The fourth count of the indictment charged a violation of the Jones-Miller Act, 21 USC 174.

On June 12, 1946, the defendant, having been found guilty by a verdict of a jury on all four counts of the indictment (T. 7) was sentenced by the Honorable Louis E. Goodman, District Judge of the United States District Court, Northern District of California, Southern Division, to a term of two years on the first count of the indictment, three years on the second count of the indictment, two years on the third count of the indictment, and three years on the fourth count of the indictment. The term of imprisonment imposed

on the second count to commence and run from and after the expiration of the term of imprisonment imposed on the first count, and the term of imprisonment imposed on the fourth count to commence and run from and after the expiration of the term of imprisonment imposed on the third count. The terms of imprisonment on the third and fourth counts to run concurrently with those imposed on the first and second counts (T. 8-9).

The defendant is now at McNeil Island Penitentiary at Steilacoom, Washington, serving the sentences imposed by the Court.

A motion to correct the judgment and sentence by setting aside the judgment and sentence imposed on Counts One and Three of the indictment was filed in the Court below (T. 12).

This motion was denied (T. 13-14).

From the denial of the motion an appeal has been taken (T. 14).

The motion to correct the judgment and sentence pertains to the first and third counts of the indictment which read as follows:

> First Count: (Harrison Narcotic Act, 26 USC 2553 and 2557) . . . said Defendant on or about the 16th day of August, 1945, in the City and County of San Francisco, State of California, within said Division and District, unlawfully did sell, dispense and distribute not in or from the original stamped package, a lot of smoking opium, in quantity particularly described as one 5-tael can of smoking opium. . . . (T. 3).

THIRD COUNT: (Harrison Narcotic Act, 26 USC 2553 and 2557) . . . said defendant, on or about the 1st day of September, 1945, in the City and County of San Francisco, State of California, within said Division and District, unlawfully did sell, dispense and distribute, not in or from the original stamped package, a lot of smoking opium, in quantity particularly described as one 5-tael can of smoking opium. . . . (T. 4).

Notice that the third count of the indictment is identical with the first count except that the date of the offense in the third count is September 1, 1945, and the date of the offense in the first count is August 16, 1945.

SPECIFICATION OF ERRORS.

The following is a specification of the errors relied upon by appellant:

I.

That the Court erred in its order of November 24, 1948, denying appellant's motion to correct the judgment and sentence.

II.

That the judgment and sentence of June 12, 1946, on the first count of the indictment is void.

III.

That the judgment and sentence of June 12, 1946, on the third count of the indictment is void.

IV.

That the first count of the indictment fails to allege an offense against the United States.

V.

That the third count of the indictment fails to allege an offense against the United States.

CONTENTION OF APPELLANT.

Appellant respectfully contends that the first and third counts of the indictment fail to allege an offense against the United States, that the judgment and sentence on each of said counts is void and that the Court below, therefore, erred when it entered its order denying the motion to correct and set aside the judgment and sentence on said counts.

ARGUMENT.

The first and third counts of the indictment do not charge a legal offense against the United States under the law. We do not attack the validity of the sentences under Counts II and IV because the defendant is entitled to his release since September 28, 1948.

Based upon our position that Counts I and III do not constitute a legal offense under the laws of the United States, because of the earned good-time credits provided for by Section 710 of Title 18, U.S.C.A., on and after September 28, 1948, defendant was and is

being illegally restrained of his liberty and is entitled to his immediate release.

Counts I and III of the indictment do not state an offense under the law. The wording of the indictment in both the first and third counts of the indictment is as follows:

> . . . said defendant . . . unlawfully did sell, dispense and distribute not in or from the original stamped package, a lot of smoking opium.

The Harrison Narcotic Act is purely a revenue measure and as such its control over matters which are by the Constitution left to the States must be limited to enforcing the collection of revenue.

> This statute purports to be passed under the authority of the Constitution, Article I, Section 8, which gives the Congress the power "to lay and collect taxes, duties, imposts, and excises, to pay the debts and provide for the common defense, and general welfare of the United States; but all duties, imposts and excises shall be uniform throughout the United States.
>
> *United States v. Doremus,* 249 U.S. 86.

> The act is not a licensing act whose aim is to control the dispensing of narcotics by confining the dispensation to proper persons, for that is an exercise of the police power not possessed as to the opiates by Congress. The act rests upon the power to tax and its provisions for registration and its restrictions on the dispensation of narcotics are for the purpose of safeguarding the tax on the dispenser and on the drug.
>
> *Starnes v. Rose,* 282 Fed. 336;

United States v. Anthony, 15 F. Supp. 553;
Nigro v. United States, 117 F. 2d 624.

> The narcotic law is essentially a revenue measure and its provisions must be reasonably applied with the primary view of enforcing the special tax. . . . Federal power is delegated and its prescribed limits must not be transcended even though the end seems desirable. . . .
>
> Congress cannot, under pretext of executing delegated power, pass laws for the accomplishment of objects not entrusted to the Federal Government. . . . Any provision of an act of Congress ostensibly enacted under power granted by the Constitution, not naturally or reasonably adapted to the effective exercise of such power, but solely to the achievement of something plainly within the power reserved to the States, is invalid and cannot be enforced.

In other words, *the Harrison Act is strictly a revenue measure.* It provides for the taxing of certain articles, and lays down punishment for those who have not paid the tax *on the articles for which a tax must be paid. Its provisions were never intended to affect those persons who deal in articles for which no tax is assessed.*

There is no tax on smoking opium; therefore the Harrison Act has no provisions covering the sale and dispensing of smoking opium.

The first and third counts of the indictment were based on Section 2553 of Title 26 U.S.C., but Section 2550 of the same title must also be included because

of the reference to that section made in Section 2553. Section 2557 of the same title deals with the penalties to be imposed on those violating the provisions of the previous sections.

> Section 2550. Tax . . . (a) Rate . . . There shall be levied, assessed, collected, and paid upon opium, coco leaves, any compound, salt, derivative, or preparation thereof, produced in or imported into the United States, and sold or removed for consumption or sale, an internal revenue tax at the rate of 1 cent per ounce. . . .
>
> Section 2553. Packages . . . (a) General requirement. . . . It shall be unlawful for any person to purchase, sell, dispense, or distribute any of the drugs mentioned in section 2550 (a) except in the original stamped package. . . .
>
> Section 2557. Penalties. . . .

It is true that Section 2550 says "opium . . . any compound, salt, derivative, or preparation thereof", but this section *was never intended to refer, and does not refer, to smoking opium* and in particular *imported* smoking opium. Note the following opinion laid down by the Attorney General of the United States:

> The next inquiry, therefore, is whether or not the said act of February 9, 1909, changed the law in this respect. Section #1 of the act provides:
>
> "That after the first day of April, nineteen hundred and nine, it shall be unlawful to import into the United States opium in any form or any preparation or derivative thereof. . ." except that all forms or derivatives other than smoking opium may be imported for medicinal purposes.

> Inasmuch, therefore, as the importation of smoking opium is by this statute absolutely prohibited, the necessary effect thereof was to repeal by implication all provisions of the tariff law relating thereto. *If it cannot be imported at all, certainly no revenue can be collected upon its importation.* Moreover, that it was intended that no revenue should be derived therefrom *even when smuggled into the United States,* is shown by that clause of the second section of said act, which provides that opium, when unlawfully imported, shall be forfeited, and when seized shall be destroyed and not sold, as would be necessary if it were subject to taxation. (Italics added.)
>
> *Opinions of the Attorney General,* Vol. 27, p. 445.

This opinion of the Attorney General refers to the Act of 1909, Section #1, c. 100. This act was amended by Section 1 of Act of May 26, 1922. This new and latest provision which is in effect today and at the time that the defendant was indicted is set forth in 21 USC 173 as follows:

> Section 173: It is unlawful to import or bring any narcotic drug into the United States or any territory under its control or jurisdiction; except that such amounts of crude opium and coco leaves as the board finds to be *necessary to provide for medical and legitimate uses only,* may be imported and brought into the United States or such territory under such regulations as the board shall prescribe, but no crude opium may be brought in for the purpose of manufacturing heroin. All narcotic drugs imported under such regulations

shall be subject to the duties which are now or may hereafter be imposed upon such drugs when imported.

Any narcotic drug imported or brought into the United States or any territory under its control or jurisdiction, contrary to law, shall

(1) *If smoking opium or opium prepared for smoking be seized and summarily forfeited to the United States Government without the necessity of instituting forfeiture proceedings of any character.* (Italics added.)

Although the wording of this new act quoted above is different from the original act of 1909 which is quoted in the Attorney General's opinion and upon which his opinion is based, *the provisions and the terms of the two acts are identical. The logic and the reasoning of the Attorney General is clearly as applicable to this new act as it was to the old act of 1909 upon which the opinion was based.*

There is no duty on smoking opium and there can be no revenue collected upon it. By the Jones-Miller Act, Section 173 of which is quoted above, it is unlawful to import any narcotic drug into the United States except those which the board may find necessary for medical or legitimate uses.

But *there are no medical or legitimate uses for smoking opium, and as stated in the law its importation is absolutely prohibited.*

. . . it is quite apparent, however, that opium prepared for smoking is neither a preparation

> nor a remedy within the meaning of this provision, and it is further apparent that it is not sold or distributed as medicine, and not for the purpose of evading the provisions of the act.
>
> *Ng Sing et al. v. United States,* 8 Fed. 2d 919.

> The Court will take judicial notice of the fact that "smoking opium" or "opium prepared for smoking" is neither a remedy nor a preparation sold as a medicine.
>
> *Chin Gum v. United States,* 149 Fed. 2d 575.

It may be seen by examination of subdivision #1 of Section 173, Title 21 (quoted above), that even if smoking opium is smuggled into the United States it shall summarily be forfeited without the necessity of forfeiture proceedings by the government. This clearly shows that it was intended that no revenue should be derived from smoking opium even when it is smuggled into the United States, and that no legitimate use should be made thereof as is done with other seized narcotics.

There is no tax on smoking opium. There is no "original stamped package" of smoking opium, and this is particularly true of imported smoking opium. If there is no assessed duty, then one cannot be guilty of failing to pay that duty which does not exist.

The words of the Harrison Act under which the defendant was indicted, "any compound, salt, derivative, or preparation" of opium for which a tax is provided by Section 2550 have no reference to *smoking* opium, but only those derivatives of opium which

have a medical value and are by law subject to tax. It has been universally held (as in *Chin Gum v. United States,* supra), that smoking opium is not a medicine and has no medical value and that it is not taxable (see Opinion of Attorney General quoted above).

Also note the following opinion:

> Appellant could not be held for the failure to apply and cancel a stamp which never existed. If it did exist, it rested upon the government to show that fact.
>
> *Chin Sing v. United States,* 227 Fed. 397.

It is true that there is a statute regarding the taxing of the *manufacture* of smoking opium.

> Title 26 USC, Section 2567: Tax: (a) Rate: An internal revenue tax of $300. per pound shall be levied and collected upon all opium manufactured in the United States for smoking purposes.
>
> (b) How paid:
>
> (1) Stamps. All opium prepared for smoking manufactured in the United States shall be duly stamped in such a permanent manner as to denote the payment of the internal revenue tax thereon.

This statute has no application to the cause at hand. The defendant was not indicted under this statute (2567) for manufacturing smoking opium without paying the tax thereon, he was indicted for "selling, dispensing, and distributing" smoking opium under the Harrison Narcotic Act (2550 and 2553).

Count II of the defendant's indictment states the opium which he allegedly sold etc. had been "imported

into the United States". The above statute (2567) applies only to opium manufactured in the United States.

Section 2553 and Section 2557 of the Harrison Narcotic Act under which the defendant was indicted in Counts I and III should have all doubts concerning the meaning of its language resolved in favor of the defendant.

> In the construction of a penal statute, it is well settled, also, that all reasonable doubts concerning its meaning ought to operate in favor of the respondent.
>
> *Harrison v. Vose,* 9 How. (US) 372, 13 L.E. 179.

> The operation and scope of criminal laws should not be enlarged by implication, but they should be strictly construed; and, where there is any well-founded doubt as to any act being a public offense . . . it should not be declared such, but should rather be construed in favor of the liberty of the citizen.
>
> *In re Rahrer,* 43 Fed. 556.

Also see:

> *United States v. One 6-54-B Oakland Touring Automobile,* 9 Fed. 2d 635.

*In proceeding to forfeit automobile for transporting cocaine, imported unlawfully and without paying duty, count based on Rev. St. #3450 (Comp. St. #6352), which relates to internal revenue taxes alone, is unsupportable, inasmuch

*The above are headnotes, not quotations.

as there are no internal revenue taxes on imported cocaine; those imposed by Harrison Anti-Narcotic Act (Comp. St. #6287-g) being impliedly repealed by passage of subsequent act (Comp. St. #8801) prohibiting importation.

Statute sanctioning activities and incidentally taxing them is irreconcilable with and repealed throughout by subsequent statute prohibiting activities without any saving clause to perpetuate taxes.

CONCLUSION.

It is respectfully submitted that from the above-quoted authorities and by strict construction of the statutes (26 USC 2553 and 2557) it conclusively appears that neither Count I nor III of the indictment under which the defendant was sentenced charges an offense against the United States. This Court has no alternative but to set aside the sentence imposed upon the said counts and to order the Court below to forthwith enter said correction in the records of these proceedings and direct the Clerk of said Court to forthwith forward a certified copy of said correction to the Warden of the United States Penitentiary at McNeil Island, Washington.

Dated, San Francisco, California,
January 26, 1949.

Respectfully submitted,
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